'Kangaroo Court': Family Law in Australia
By John Hirst
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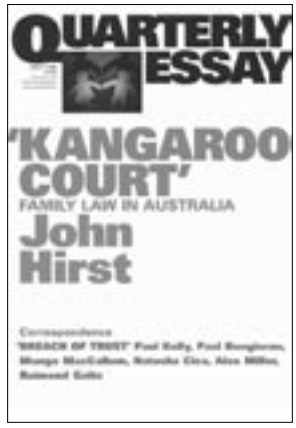
You need to be a good scholar, a good writer, as well as brave, to launch a long-overdue critique of the Family Court. La Trobe University historian John Hirst fills the bill with this curial *J'accuse* probing the Court's injustices. The unending stream of anger directed at the Court since its inception has honed the public relations and polemical skills of its judges. So, on cue, they have responded quickly to Hirst's analysis. The former Chief Justice of the Court is reported as describing the criticisms as 'emotional and unbalanced… grossly irresponsible, and just plain wrong', with the Acting Chief Justice joining him in dismissing the charges. Hirst has replied in the press, showing that the judges give no evidence rebutting his central criticisms about the deficiencies of the Court and the family law it administers. The sources supporting his claims are fully referenced in this *Quarterly Essay*.

This is a sensible, informative, balanced and fair book. It breaks the silence and secrecy that have surrounded the multiple injustices inflicted on so many of the 50,000 or more men and women who divorce each year. It is a passionate book, but nothing more than the justified indignation of one who has seen wrongs inflicted and is driven to speak. Yet it remains thoroughly objective in identifying problems in both family law and in the Court's interpretation and administration of the law.

Hirst's main focus is on the Court's handling (or mishandling) of custody of children and access to them following divorce—or, in official parlance now, 'residence and contact'. Public opinion, tradition, parents themselves, and the Court favour mothers as the prime carers of children—especially young children. Custody settlements may be agreed between divorcing parents or decided by the Court when parents can't agree. Either way, somewhere between 70 and 80% of children end up with the mother. Hirst says: 'The burden of this essay has not been that the Court has been necessarily wrong to choose the mother as custodian. It is very hard to argue against the mother as the best primary carer of a baby and a very young child. But having given the mother custody, the Court allows her to do what she likes. She can shut out the father, change the kids' names, make false allegations, defy the Court—all more or less with impunity'. His concern, then, is to demonstrate in case studies and otherwise that such things happen quite frequently, and the outcome has been the anguish, and worse, of thousands of fathers either excluded from or marginalised in the lives of their children.

Passed by only one vote with the support of the two main parties, the Family Law Act 1975 establishing the Court was an inititiative of the Whitlam government and Attorney-General Lionel Murphy. As well as removing marital fault as a ground for divorce and substituting 'irretrievable breakdown' of the marriage, the Act was seen as a progressive step in avoiding the trauma and cost of divorce by discouraging litigation and establishing a 'caring' or 'helping' court.

In its early days the Court took a severe view of parents—particularly fathers—who disobeyed its custody orders by abducting children from the custodial parent, or mothers who refused legitimate access to a non-custodial father. Before long, however, the Court began to undermine its own authority by abandoning the use of its contempt-of-court powers in such cases. The overriding principle became what the Court believed, in its discretion, to be in 'the best interests of the child'. Accordingly, a parent (usually the father) who had been allowed regular access under the terms of a divorce settlement, but who was effectively denied access by the behaviour of the custodial parent, could no longer depend upon the Court to protect that access if the custodial parent was determined to deny it. If the Court believed it would not be in 'the best interests of the child' to fine or gaol the offending custodial parent, the access-denying behaviour would be ignored. So the principle of 'best interests' and its absolutist interpretation and use has since been employed by the Court as the justification for failing to uphold the Court's own access rulings. Thousands of parents, in the main caring and decent fathers, have effectively lost their Court-determined entitlement to keep in regular contact with their children because the Court will not insist on the implementation of its orders. Hirst quotes from the reports of various bodies, such as the Law Council of Australia, the Law Reform Commission, a Parliamentary Committee, and the Family Law Council, lamenting the failure of the Family Court to act against non-compliance with its orders.



In doing so, the Court retreated from its own, early precedents which had firmly declared that its authority should be upheld, and that there were other considerations that should be taken to account in conjunction with the 'best interests of the child'. For example, considerations broadening the scope and content of the 'child's best interests' by acknowledging the importance of fathers in the emotional life and long-term socialisation of children and the inhumanity that might be visited upon fathers if severed from their children. Hirst, in agreeing with this latter approach,

says: 'This is not to suggest that the best interests of the child should be overlooked in enforcement; rather that they should not be the paramount consideration… '.

The difficulty, of course, is that allowing, say, a father's interest in having time with his children to be included as a criterion that must be taken into account, could conceivably lead to a reduction of the child's welfare while enlarging the father's. Should the Court accept 'father's time' when it believes that this will not reduce the welfare of the child? Or should the Court countenance some reduction in the child's welfare if it believes that this is balanced, or more than offset, by the benefit to the father? To accept either of these propositions would be contrary to the Court's present practice. It may come as a surprise to many conscientious fathers to learn that, under the law as interpreted by the Family Court and the High Court, non-custodial fathers have no legal right of post-divorce access to their children. Again, the principle of the 'best interests of the child', as interpreted in particular cases by the Court, prevails. To quote from Hirst: 'The principle on which the Court operates is, "access by a non-custodial parent will *only* be ordered where access will *advance and promote* the welfare of the child"' (emphasis added).

A strength of the book is the introduction of some individual case studies of men, fighting for contact with their children, who have suffered injustice under the Court's implementation of the law. They make sad but fascinating reading. In introducing the first of these cases, Hirst makes an important point elaborated in the case study:

> Sometimes defenders of the Court cite the low 5% trial figure [of contested divorce settlements] to show that most people are satisfied with how their cases are settled. This is far from the truth. People settle because they run out of money to pay lawyers (and haven't got the time and energy to conduct their own case) or they face an allegation that is too hard to fight or they are told they have no hope of winning what they might want. Fathers who might want to see more of their children than every second weekend have little hope unless they can argue or allege that their wife is somehow unfit.

Perhaps many will also be surprised to learn that the law requires that children's names can be changed only with the consent of both parents. Nevertheless, the Family Court will allow a change of name against the wishes of one parent if it considers that the change of name will be—you guessed it—in the 'best interests of the child'. Hirst gives us a case study on this matter where the Court refused an application by a father to restore the family surname of his children which had been changed without his consent by the remarried mother. Hirst comments: 'The Court is committed to ignoring wrongful behaviour in a custodial parent unless it damages the best interests of the child. This makes it hard for non-custodial parents to see it as a court of justice'.

A further source of injustice, yet to be remedied, is the effect upon fathers and relations with their separated children of custodial mothers' unsubstantiated allegations of abuse of the children by the fathers. Abuse of children is, of course, a serious issue and the need to protect children is unarguable. The trouble is that accusations of abuse without foundation may be unscrupulously used in battles over custody or simply as part of the malice that is not uncommon in divorce proceedings.

As Hirst notes, an allegation is not investigated by the Court but passed over to the state welfare departments who report either that it has been substantiated or not substantiated—not that it has not occurred. The victim of the 'unsubstantiated' allegation has not been declared innocent and continues to wear a stigma that cannot be removed unless a criminal charge is brought and shown to be false. In the meantime, so far as the Family Court is concerned, accused fathers have to prove their innocence. The burden of proof and the costs of doing so have shifted to them.

Without such proof, and bearing the slur of an 'unsubstantiated' accusation, the father stands as supplicant for justice before the Court. Hirst summarises the way in which the Court has developed principles removed from the established civil law test of determining the truth or falsity of allegations on 'the balance of probabilities' to adopt instead the quicksand tests of 'lingering doubt' and 'unacceptable risk'. This has meant that the Court has evaded its responsibility to establish whether or not abuse has in fact taken place and to *assess* risk. In other words: 'Now the Court was assessing whether something that might or might not have happened might happen again' in response to an unproven allegation that abuse had taken place. In using the tests of 'lingering doubt' and 'unacceptable risk' the Court stacks the odds against the father. The unjust outcome for many fathers is lingering stigma and denial of free access to their children. Perjury by mothers may go unpunished and an unsavoury corollary in some cases of unfounded allegations has been mothers instilling in their children repulsive falsehoods about their fathers.

Towards the end of the book, John Hirst devotes a few pages to discussing no-fault divorce and observes that the usual practice of the Court is to award custody to the mother unless there is clear evidence that she is unfit. No-fault divorce (which may be unilaterally invoked) and the usual mother-custody that follows bring the prospect of reduced or lost contact with their children for unblemished fathers, irrespective of the fact that the wife may have seriously misconducted herself during the marriage. For example, a fit mother who has been an

adulterous and divorce-invoking wife need have no fear that her conduct in the marriage will prejudice her custody of the children; or lessen the obligation of the father to financially support the children, to be prepared to see less of them, to yield possession of the family home to the mother and her lover, and to find another home for himself.

Hirst finds such a scenario morally disturbing and unjust; not on the score that the mother has custody, but because of the *consequent* and unjust damage to the material and emotional interests of the father when the circumstances of the marriage and divorce are ignored. A survey by The Centre for Independent Studies which Hirst quotes shows that 75% of Australian adults agree. It is a scenario made possible by the legal irrelevance of marital misconduct to the terms of a divorce settlement. But Hirst believes that public opinion would not support a move to allow the Court to take serious marital misconduct into account in determining the terms of a divorce settlement. The Court, he says, 'embodies the contradictions of our age…' and we are not likely 'to supply new instructions that will rescue it from the no-fault morass.'

Recently, the question of legislating for a *rebuttable* presumption of joint custody has been the subject of inquiry by the House of Representatives standing committee on Family and Community Affairs. During its deliberations the suggestion was attacked by the Chief Justice of the Family Court and others. Hirst supports the proposal. The standing committee, for reasons that are not clear, did not recommend legislating for joint custody.

Hirst comes out in favour of introducing the inquisitorial method to the Court's proceedings, whereby the judge gathers the evidence in the absence of the usual rules of evidence, rather than the traditional adversarial method. This conforms with the Federal Government's own acceptance of the principle following such a recommendation in the report of the House of Representatives standing committee. Hirst says little, however, about the possible objections and difficulties that this might involve, except noting that lawyers could not be excluded from advising clients involved in such proceedings.

Returning to his main theme and summing up his charges, Hirst focuses on the perverse results of using 'the best interests of the child' as an overriding principle in guiding judgements. He says that despite attempts by the Federal Government and committees of inquiry to induce the Court to ensure as far as possible the full involvement of both parents in the child's life, it has not done so. Since the principle remains, it continues to be used by the Court to:

* abandon the enforcement of contact orders;
* deny even a presumptive right in a parent to see a child;
* allow custodial parents to change their children's names without permission;
* keep parents accused of child abuse from seeing their children though no offence has been proved against them.'

He concludes gloomily that he 'cannot see the way by which the Court can be rescued', but in the meantime he recommends the following changes to improve it:

* The Court must uphold its authority when it has been deliberately and persistently defied.
* Fit parents should have the right to see their children.
* If access is refused to a parent entitled to it, child support should not have to be paid.
* Accusations of abuse should be resolved by a clear finding of guilt or innocence, they should be made in open court on oath, and false accusers should be charged with perjury.
* The Court should have its own professional body to investigate abuse accusations.
* Court proceedings should be inquisitorial.
* The *Family Law Act* should declare that the best interests of the child will be served by maximising the time and involvement each parent is willing and able to contribute in raising their children—unless the Court finds on good grounds that the parent is a danger to the child.

This timely and well-argued book shows how far the Court and family law have strayed from the delivery of justice in divorce settlements and child custody. The outcome is social disarray, loss of respect for the Court, more human misery than necessary, impotent rage, and sometimes suicide among its victims. After 30 years of the Court's operations Hirst is surely right in pressing for reform to establish that balance of legal rights and obligations, and their just enforcement, without which the institutions of a liberal society, including the family, cannot thrive.

Reviewed by Barry Maley

Law and Order in Australia
By Don Weatherburn
Sydney, The Federation Press, 2004, 238pp, $37.95
ISBN 1 86287 532 4

Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research, has written a useful though flawed little book summarising what we know about the extent of our crime problem, its causes, and possible solutions.

It turns out that we do not know as much as we should, for crime statistics in Australia are woefully poor. Weatherburn complains that it is impossible to compile a consistent set of crime data for the last 40 years (the ABS only has reliable statistics from 1993, and police records for specific crimes during the 1970s and